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In The

Supreme Court of the United States

October Term, 1972

No. 72-1632

STEVEN WISE WRIGHT AND
CLARENCE EDWARD WRIGHT, JR.,
Petitioners,

v.

VIRGINIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the Commonwealth of Virginia, respectfully submits the following brief in opposition to the granting of a writ of certiorari in the above matter. The parties will be referred to herein by their respective positions in the trial court, i.e., defendants Steven Wise Wright and Clarence Edward Wright, Jr., and Commonwealth.

QUESTIONS PRESENTED

The questions presented are set out in the brief of the defendants.

STATEMENT OF THE CASE

Defendants' statement of the case and statement of facts is substantially correct and is hereby adopted. In addition thereto, the Commonwealth directs the Court's attention to the testimony of Deputy Sheriff Guthrie appearing at pages 3-5 of the transcript of defendants' trial, particularly with reference to said witness's description of the actions of the defendant Steven Wright, inasmuch as it is this description of said actions that shows the conduct of Steven Wright which was the basis for his conviction of disorderly conduct.

LAW AND ARGUMENT

1. Was The Conviction Of The Defendants Constitutionally Invalid On The Basis That It Was Obtained Pursuant To An Unconstitutional Statute Or On The Basis That There Was A Total Lack Of Evidence Of Violation Of That Statute?

The defendants rely upon a number of decisions of this Court holding various state criminal statutes unconstitutional as being either vague or overbroad. The Commonwealth submits that this reliance is misplaced in that said decisions are clearly distinguishable both factually and legally from the instant case. All of those decisions involve statutes or ordinances which had the potential of unconstitutionally abridging freedom of speech so as to cut off the opportunity for public debate, protest, and discussion, and the convictions were of a general nature thereby raising the possibility that the convictions were for a proper exercise of the defendant's freedom of speech.

For instance, *Ashton* v. *Kentucky*, 384 U.S. 195, 16 L.Ed.2d 469, 86 S.Ct. 1407 (1966) is distinguishable because it involved a criminal libel statute which included the language "any writing calculated to create disturbances of the peace," and because the trial court instructed the

jury on the terms of the statute without limitation, thereby allowing the possibility that the conviction was based on unconstitutional grounds. It involved the possibility of a conviction for breach of the peace where the offense was imprecisely defined and involved an intrusion on the defendant's First Amendment rights. By the same token, *Gooding* v. *Wilson,* 405 U.S. 518, 31 L.Ed.2d 408, 92 S.Ct. 1103 (1972) involved a statute which punished only spoken words, thereby bringing about an obvious incursion on First Amendment rights, unless the state courts had supplied a requisite construction narrowly and precisely defining the prohibitions of the statute so as not to violate freedom of speech, and in *Gooding* the state courts had not provided such construction.

However, this Court has recognized that when the state courts have provided such a construction of a state statute, that construction will be binding on the United States Supreme Court. *Gooding* v. *Wilson, supra; Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 86 L.Ed. 1031, 62 S.Ct. 766 (1942).

Contrary to the assertion of the defendants, the Commonwealth submits that the courts of this state have in fact defined what is meant by the provision in § 18.1-253.2 of the Code of Virginia (1950), as amended, prohibiting persons to behave in a "riotous or disorderly manner" in any public place. In *Hackney* v. *Commonwealth,* 186 Va. 888, 45 S.E.2d 241 (1947), the Virginia Supreme Court cites the "usual definition" of disorderly conduct as "all such acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether committed by words or acts." The Virginia Supreme Court further stated that "the dominant purpose of its enactment was to preserve peace and good order"; and a person violates the statute if "his conduct is such as tends to

corrupt public morals or to outrage the sense of decency of others . . . who may be within sight or hearing of the perpetrator." See also *Parker* v. *McCoy*, 212 Va. 808, 812, 188 S.E.2d 222 (1972). In *Taylor* v. *Commonwealth*, 187 Va. 214, 46 S.E.2d 384 (1948), the Virginia Supreme Court, while not specifically defining disorderly conduct, did refer generally to the types of activity that the defendant in *Taylor* did not participate in so as to overturn her conviction for disorderly conduct. Those types of activity which the Court stated would be disorderly conduct were as follows: "She had not disturbed any person or persons, or caused any commotion affecting, in any degree, the peace and good order of the bus. Neither her words nor her acts has a vicious or injurious tendency, offensive to good morals or public decency . . . . She was guilty of no definite misbehavior or misconduct in the sense that she was disorderly or turbulent."

In no way does a prohibition on that type of activity bring about a broad incursion on freedom of speech such as was the case with the statutes in *Gooding* and *Ashton* referred to above. Furthermore, the conduct of the defendant Steven Wright could by no stretch of the imagination be construed as conduct intending to exercise some asserted freedom of speech. While the defendant Steven Wright may have used spoken words as well as conduct in his attempts to interfere with Deputy Sheriff Guthrie, his speech was simply speech designed to argue and overcome the speech of Deputy Sheriff Guthrie and Mr. Kessler, the owner of the establishment. It was not the speech or the words of the defendant Steven Wright which were important in his conviction of disorderly conduct, but it was the manner in which he attempted to insert his speech and the manner in which he used physical conduct to overcome a discussion between two other persons and to disrupt the

normal duties of a law enforcement officer. The trial court went to great lengths to specify in detail the basis for his finding and conviction of disorderly conduct, and the findings of the trial court were quite consistent with the definition of disorderly conduct previously given by the Virginia Supreme Court. This again was in no sense a general verdict under a broad reaching statute and in no sense left open for doubt the grounds or basis for the conviction, as was the case in *Ashton, supra*, and *Cantwell* v. *Connecticut*, 310 U.S. 296, 84 L.Ed. 1213 (1940) relied upon by the defendants in their brief.

This Court has held that it is constitutionally permissible to rest a conviction for disorderly conduct on a finding that the defendant refused to obey police commands to stop obstructing the sidewalk so as to block traffic along it. *Bachellar* v. *Maryland*, 397 U.S. 564, 25 L.Ed.2d 570, 90 S.Ct. 1312 (1970). The facts of the instant case are very similar to the facts in *Colten* v. *Kentucky*, 407 U.S. 104, 32 L.Ed.2d 584, 92 S.Ct. 1953 (1972), and just as in *Colten*, the defendant in the instant case at the time of his arrest was not undertaking to exercise any constitutionally protected freedom. Rather, he appeared to have had no purpose other than to cause inconvenience and annoyance and disturbance to the Deputy Sheriff in question. Therefore, the statute as applied to the defendant herein did not chill or stifle the exercise of any constitutional right.

The Commonwealth also submits that the defendants' reliance on *Thompson* v. *Louisville*, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624 (1960) is misplaced. In *Thompson*, the conviction of a man who had been found guilty of loitering and disorderly conduct was reversed on the grounds that his conviction was totally lacking in evidentiary support. The proposition for which that case stands is simple and clear. It has nothing to do with concepts relating to the

weight or sufficiency of the evidence in any particular case. It goes rather to the question of whether a defendant's conviction rests upon any evidence at all. The only evidence in *Thompson* was that the defendant was "argumentative" with the arresting officer as to why he was being arrested. As can be seen from reading the testimony of Deputy Sheriff Guthrie, as well as from reading the opinion of the trial court, the defendant Steven Wright in the instant case certainly was more than simply argumentative with the arresting officer, and certainly there was enough evidence on which to rest the conviction so as to at the most bring about a question of sufficiency of the evidence and not a question of the total lack of any evidence at all.

2. Were The Convictions Of Steven Wrigth For Resisting Arrest And Clarence Wright For Assault And Battery And Resisting Arrest Also Invalid On The Grounds That All Of Their Actions Occurred Solely Because Of An Illegal Arrest Of Steven Wright?

The Commonwealth submits that the arrest of Steven Wright under the circumstances was proper and valid and therefore, the actions of Steven Wright and Clarence Wright in order to resist and prevent that arrest were clearly unlawful, and those convictions are valid and proper. The proposition set forth by the defendants in their brief in citing *Banks* v. *Bradley,* 192 Va. 598, 66 S.E.2d 526 (1951) has no applicability where the arrest was proper since they refer only to the extent of the right to resist an unlawful arrest. Even for the sake of argument, if the arrest of Steven Wright was illegal, the actions of Clarence Wright in jumping upon the back of one of the arresting officers and physically attacking him was certainly not justified, and therefore, his conviction for assault and battery was proper under any circumstances.

CONCLUSION

For the foregoing reasons, the Commonwealth submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on or before the 10th day of September, 1973, I mailed three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to Samuel W. Tucker, Esquire, Hill, Tucker & Marsh, 214 East Clay Street, Richmond, Virginia 23219, counsel for petitioners.

GILBERT W. HAITH
Assistant Attorney General